

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE T. HEAD,

Defendant-Appellant.

UNPUBLISHED
February 17, 2005

No. 251324
Kalkaska Circuit Court
LC No. 01-002137-FH

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Defendant appeals his sentence of five to fourteen years in prison imposed on his plea-based conviction of forgery, MCL 750.248. We vacate defendant's sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with multiple counts of forgery and uttering and publishing, MCL 750.249. He pleaded guilty of one count of forgery in exchange for dismissal of the remaining charges. During the plea hearing defendant admitted that he opened a checking account under a false name for the purpose of writing forged checks.

The applicable statutory sentencing guidelines established a minimum sentence range of zero to eleven months. The trial court concluded that substantial and compelling reasons existed to depart from the guidelines and sentence defendant to prison.¹ The trial court observed that: defendant wrote a great number of forged checks as part of a prolonged and calculated scheme; an order of restitution could not be enforced during a period of probation because defendant, who is a citizen of Great Britain, would be deported upon release from any term of incarceration; and

¹ Under the statutory sentencing guidelines, if the upper limit of the established minimum sentence range is eighteen months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the jurisdiction of the Department of Corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or twelve months, whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

defendant had demonstrated no intent to make restitution. The trial court sentenced defendant to five to fourteen years in prison, with credit for ninety-six days, and ordered him to pay restitution in the amount of \$8,300.

To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. The reason for the departure must be articulated by the trial court on the record. MCL 769.34(3). A departure from the guidelines cannot be affirmed on the basis of a reason which the appellate court perceives but the trial court did not articulate. A substantial and compelling reason articulated by the trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable for error, and the determination that objective and verifiable factors merited departure from the guidelines range for an abuse of discretion. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic which was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock*, *supra* at 265-269.

We vacate defendant's sentence and remand for resentencing. Defendant's status as an alien, and not his apparent inability or unwillingness to make restitution, prompted the trial court to exceed the guidelines and impose a prison term. A trial court may not use an individual's alienage as a reason for departing from the guidelines. MCL 769.34(3)(a). On the other hand, the trial court correctly found that the guidelines did not adequately account for the scope of defendant's illegal enterprise. Defendant admitted he wrote many more fraudulent checks than were accounted for in the offenses with which he was charged and such fact was objective and verifiable, and constituted a substantial and compelling reason for exceeding the guidelines. MCL 769.34(3)(b); *Babcock*, *supra* at 265-269.

The trial court's articulated reasons for exceeding the guidelines were partially invalid. On the record before us, we cannot ascertain whether the trial court would have departed to the same extent had it considered only valid reasons. Resentencing is necessary under the circumstances. *Id.* at 260-261.

Defendant's sentence is vacated and the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio